Hamad bin Mat Noor v Tengku Sri Paduka Raja & Ors

HIGH COURT (KUALA TERENGGANU) — ELECTION PETITION NO 3 OF 1990
LAMIN J
23 JUNE 1993

Elections *— Petition — Allegation of corrupt practice — Bribery of voters — Petition to declare election null and void — Standard of proof — Election Offences Act 1954 ss 11, 31, 32 & 33*

Elections *— Petition — Procedure — Whether 'rules of court' include the Criminal Procedure Code (FMS Cap 6) — Election Offences Act 1954 s 42*

Evidence *— Election offences — Allegation of corrupt practice — Standard of proof before court of election judge — Balance of probabilities — Election Offences Act 1954 ss 11, 32 & 33*

Civil Procedure *— Election offences — Petition — Procedure — Court of election judge — Whether civil court — Whether regulated by Rules of the High Court 1980 — Election Offences Act 1954 s 42(1) — Rules of the High Court 1980*

Words and Phrases *— 'Rules of court' — Whether includes Criminal Procedure Code (FMS Cap 6) — Courts of Judicature Act 1964 ss 16 & 17 — Criminal Procedure Code (FMS Cap 6) — Election Offences Act 1954 s 42(1)*

Following a state assembly election, the petitioner filed a petition to declare the election of the first respondent null and void on the ground that the first respondent, by himself or his agents, had allegedly committed acts of corrupt practice. Counsel for the first respondent submitted that such acts as alleged to have been committed were criminal or quasi-criminal in nature and therefore, the standard of proof must be the same as that applied in criminal cases, ie the onus was on the petitioner to prove them beyond reasonable doubt.

Held, dismissing the objection of the first respondent:

(1) The alleged acts of corrupt practice came within the meaning of s 32(c) of the Election Offences Act 1954 ('the Act') and none of the acts enumerated in s 32 of the Act was criminal in nature. If such alleged acts were proved, then it would be a ground to declare the election of the respondent concerned null and void but there would be no finding of guilt and no conviction.

(2) A court of an election judge was a civil court and such a conclusion was fortified by s 33(2) of the Act in that the judge's power to call witnesses and to have them sworn before him was as nearly as circumstances admit as that of a High Court judge sitting in exercise of his 'original civil jurisdiction'.

(3) In order to determine whether an act is criminal in nature, one must ask the question as to whether it entails penal consequences.

The acts enumerated in s 32 of the Act would not be visited by some form of punishment and therefore, the standard of proof required must be that as applied in civil proceedings, that is on the balance of probabilities.

(4) 'Rules of court' do not include the Criminal Procedure Code (FMS Cap 6) ('the Code'). The Code is enacted by Parliament while 'rules of court' are made by a rules committee appointed under s 17 of the Courts of Judicature Act 1964. The rules are made for regulating of the conduct of the High Court and the Supreme Court in their civil jurisdiction. The words 'rules of court' in s 42(1) of the Act must mean, for the purpose of the present case, the Rules of the High Court 1980.

[Bahasa Malaysia summary

Berikutan suatu pilihanraya dewan undangan negeri, pempetisyen telah memfailkan suatu petisyen bagi deklarasi bahawa pimilihan responden pertama adalah batal dan tidak sah atas alasan yang responden pertama, dengan sendiri atau melalui agennya, telah melakukan perbuatan rasuah. Peguambela responden pertama menghujahkan bahawa perbuatan yang dikatakan telah dilakukan itu bersifat jenayah atau kuasi-jenayah, dan oleh itu, standard membukti mestilah sama seperti yang dikenakan dalam kes jenayah, iaitu beban membukti terletak pada pempetisyen untuk membuktikannya sehingga tidak ada keraguan yang munasabah.

Diputuskan, menolak bantahan responden pertama:

(1) Perbuatan rasuah yang dikatakan telah dilakukan oleh responden pertama itu termasuk dalam makna s 32(c) Akta Kesalahan Pilihanraya 1954 ('Akta itu') dan tidak satupun daripada perbuatan yang disebutkan di dalam s 32 Akta itu bersifat jenayah. Jika perbuatan tersebut boleh dibuktikan, itu akan menjadi asas untuk mendeklarasikan bahawa pilihan responden pertama adalah batal dan tidak sah, tetapi tidak ada keputusan bersalah dan tidak ada sabitan.

(2) Mahkamah hakim pilihanraya adalah suatu mahkamah sivil dan pendapat ini diperkuatkan oleh s 33(2) Akta itu, iaitu kuasa hakim untuk memanggil saksi dan mengarahkan supaya mereka bersumpah di hadapannya, adalah seberapa sama yang keadaan membolehkan (as nearly as circumstances admit) seperti seorang hakim Mahkamah Tinggi yang bersidang dalam menjalankan bidang kuasa sivil asalnya (original civil jurisdiction).

(3) Untuk memutuskan sama ada sesuatu perbuatan itu bersifat jenayah, seseorang mesti menanyakan soalan sama ada ia melibatkan akibat penal. Perbuatan yang disebutkan di dalam s 32 Akta itu tidak membawa sebarang hukuman dan oleh itu, standard membukti yang diperlukan mestilah sama dengan yang dikenakan dalam prosiding sivil, iaitu pada imbangan kebarangkalian.

(4) 'Kaedah-kaedah mahkamah' tidak termasuk Kanun Acara Jenayah (FMS Bab 6) ('Kanun itu'). Kanun itu diperbuat oleh Parlimen

manakala 'kaedah-kaedah mahkamah' dibuat oleh suatu jawatankuasa kaedah yang dilantik di bawah s 17 Akta Mahkamah Kehakiman 1964. Kaedah-kaedah itu dibuat untuk mengawalselia kelakuan Mahkamah Tinggi dan Mahkamah Agung dalam bidang kuasa sivil mereka. Untuk tujuan kes ini, perkataan 'kaedah-kaedah mahkamah' di dalam s 42(1) Akta itu mesti bermakna Kaedah-Kaedah Mahkamah Tinggi 1980.]

Cases referred to

1 *Gurdial Singh Nijar v KS Balakrishnan* [1993] 1 AMR 10 (refd)
2 *Ali Amberan v Tunku Abdullah* [1970] 2 MLJ 15 (refd)
3 *Ghasi Ram v Dal Singh & Ors* AIR 1968 SC 1191 (refd)
4 *Re Pengkalan Kota Bye-Election; Teoh Teik Huat v Lim Kean Siew & Anor* [1981] 1 MLJ 265 (folld)
5 *Re Tanjong Puteri, Johore State Election Petition; Abdul Razak bin Ahmad v Datuk Md Yunos bin Sulaiman & Anor* [1988] 2 MLJ 111 (refd)
6 *Ng Eng Kooi & Anor v PP* [1970] 1 MLJ 267 (refd)
7 *Sabdin Ghani v Mohamed Saidi Lampoh & 25 Other Election Petitions* [1983] 2 MLJ 61 (folld)
8 *Abu Bakar v Mohamed Zain* [1967] 1 MLJ 168 (refd)

Legislation referred to

Election Offences Act 1954 ss 11, 31, 32, 33, 42(1)

Zaki bin Tun Azmi (Rashid & Lee) for the petitioner.

Wan Abd Muttalib bin Embong (Wan Abd Muttalib & Co) and *Suhaimi bin Kamaruddin (Adlan & Hj Suhaimi)* for the first respondent.

*Soraya Osman (*Senior Federal Counsel*)* for the second and third respondents.

Lamin J: Learned counsel for the first respondent, Dato Suhaimi, submitted that all the acts itemized in sub-paras (a) to (d) of para 3 of the petition, as alleged to have been committed, were criminal or quasi-criminal in nature and therefore, the standard of proof must be the same as that applied in criminal cases, ie proof beyond reasonable doubt, and because the petitioner was making the allegations, the onus accordingly must be on the petitioner to prove them. The allegations contained in sub-paras (a) to (d) are as follows:

(a) Pada 21 Oktober 1990, jam lebih kurang 10.30 pagi, pempetisyen Hamad bin Mat Noor (No KP: 4202986), seorang [bernama] Ahmad bin Sarat (No KP: 4702557) dan seorang [bernama] Jaafar bin Awang Lah (No KP 5589174), masing-masing telah melihat sendiri responden pertama telah memberi wang kepada beberapa orang pemilih atau pengundi di kawasan bangsal mengundi (polling booth) di Felda Jerangau Barat. Dengan yang demikian, pempetisyen sesungguhnya percaya bahawa responden pertama telah menyalahi s 10(a) Akta Kesalahan Pilihanraya 1954.

(b) Pempetisyen seterusnya menyatakan bahawa penyelewengan tersebut dilakukan oleh ejen-ejen dan/atau penyokong-penyokong responden pertama pada 20 Oktober 1990, lebih kurang jam 12.30 tengah malam, bertempat di wakaf Felda Jerangau Barat di mana seorang pengundi atau pemilih telah cuba disogok dengan tujuan untuk memujuknya menyertai parti Semangat 46 cawangan Jerangau Barat dengan jaminan wang sebanyak RM2,500 untuk beliau supaya menyokong responden pertama.

(c) Pempetisyen seterusnya menyatakan:

(i) responden pertama, pada 19 Oktober 1990, lebih kurang jam 5 petang di kawasan Jerangau Barat, telah secara langsung atau tidak langsung atau melalui seseorang lain bagi pihaknya menawarkan, menjanjikan atau berjanji untuk mendapatkan atau akan berusaha untuk mendapatkan apa-apa wang atau balasan bernilai kepada dua orang pengundi atau pemilih bagi mendorong pengundi atau pemilih tersebut supaya menyertai dan mengundi parti Semangat 46, iaitu parti responden pertama.

(ii) kemudian kedua-dua pengundi atau pemilih tersebut telah dibawa oleh ejen responden pertama dari Jerangau Barat ke Ajil, bilamana kedua-dua pengundi atau pemilih tersebut telah disogokkan dengan wang bagi mendorong kedua-dua pengundi atau pemilih tersebut supaya mengundi responden pertama dan seterusnya mengisytiharkan keluar dari UMNO.

(d) Pempetisyen seterusnya menyatakan pada lebih kurang pukul 12.30 tengah hari di tempat mengundi di Felda Jerangau Barat pada 21 Oktober 1990, iaitu hari mengundi, responden pertama secara langsung atau secara tidak langsung, dengan sendirinya atau melalui seseorang yang lain bagi pihaknya telah menawarkan jumlah wang RM20 kepada beberapa pengundi atau pemilih wanita yang membawa anak.

In support, Dato Suhaimi cited the case of *Gurdial Singh Nijar v KS Balakrishnan,*[1] where the learned Mohd Noor bin Hj Ahmad J said that he had 'not lost sight of the principles pertaining to elections echoed by judges previously, notably,' Raja Azlan Shah J (as His Majesty then was) in the case of *Ali Amberan v Tunku Abdullah*[2] and Hidayatullah J in *Ghasi Ram v Dal Singh & Ors*[3] and then he went on to say:

> It is well settled that an allegation of corrupt practice is of a quasi-criminal nature inasmuch as a finding of corrupt practice entails penal consequences. The onus is on the petitioner to prove corrupt practice, viz bribery, beyond reasonable doubt, by evidence which is clear, unequivocal and unambiguous.

With that, Dato Suhaimi said that he should be allowed to submit 'no case to answer' and at the same time he should not be prevented from adducing evidence in the event the court found that there was a case for his client to answer.

He also touched on the reading of s 42(1) of the Election Offences Act 1954 ('the Act') which reads: 'The procedure and practice on election petitions shall be regulated by rules of court'.

Briefly he concluded that the words 'rules of court' did not mean the Rules of the High Court 1980 and as they were printed in small letters, they must refer to all rules of procedure of the courts, be they criminal or civil. He submitted that the Act gave the court very wide powers, in that should the election judge find the act alleged to have been committed was criminal

in nature, the judge could and must elect to apply the onus of proof in a criminal case, and that the proceedings must be governed by the Criminal Procedure Code (FMS Cap 6) ('the Code'). This would mean that the words, 'to the satisfaction of the election judge' appearing in s 32, gave the judge the passport to apply either the standard of proof in a criminal case or in a civil case depending on the finding of the judge as regards the nature of the act or acts alleged to have been committed.

As I see it, the scheme in the Act can be divided into two clear areas of judicial functions. The first relates to those provisions pertaining to acts, the proof of which must be done by way of criminal prosecutions in a criminal court, which by the end of the day will hand out punishments if the charges are proven. The second relates to acts, allegations of which are to be brought before the election judge by way of petitions with the view to avoid elections. Only two types of courts are envisaged by the Act to deal with those two areas, namely, the sessions court (ss 11 and 27), which is to attend to criminal prosecutions, and the court of an election judge, which is to hear election petitions. The sessions court will no doubt conduct its proceedings in accordance with the Code because criminal charges are brought before it for determination. As for the conduct of proceedings in a court of an election judge, I am extremely attracted to the proposition that the court of an election judge must be regulated by one clear cut procedure and not, as suggested, that it must depend on the circumstances of each case, in that whether the act involved was criminal in nature or otherwise. If an election judge were given powers that could be stretched beyond the unknown, then different election judges may very well treat the same situation differently and this would bring about uncertainty in the law.

Dato Suhaimi implored me to adopt the approach that I must first determine the nature of the alleged act and having done that, it would, by itself, identify the type of onus of proof, and accordingly, the kind of procedure to be followed. I have never dismissed from my mind the standard of proof required of a petitioner in an allegation of corrupt practice and the grave concern expressed by Raja Azlan Shah J (as His Majesty then was) in *Ali Amberan*,[2] regarding the 'primary purpose of the diverse provisions of the election law' being that 'to safeguard the purity of the election process' and the duty of the court 'to purge elections all kinds of corrupt or illegal practices so as to protect the political rights of the citizens and the constituency'. As to the standard of proof, Abdoolcader J (as he then was) in *Re Pengkalan Kota Bye-Election; Teoh Teik Huat v Lim Kean Siew & Anor*[4] was of the same opinion when he said [at p 267]:

> Adverting briefly to the requisite elements of ss 10(a), 11(1) and 32(c) of the Act for the purposes of these proceedings, in a corrupt practice such as bribery which is alleged in this case the corrupt intention and the corrupt inducement to the electors or voters to vote or refrain from voting must exist. The corrupt practice of bribery which is a criminal offence by statute must be strictly proved beyond all reasonable doubt by clear and unequivocal evidence, ...

In order to determine whether an act is criminal in nature, it has been said time and again that one must ask the question as to whether it entails penal consequences. In other words, whether it is visited by some form of

punishment. In the case of s 11(1) of the Act, the form of punishment is clearly provided. It is also clearly provided that offences under paras (a) and (b) of s 11(1) (which include offences of bribery) are therein categorized as seizable offences 'within the meaning of the Criminal Procedure Code'. I repeat, those offences are to be proved by way of charges preferred in a criminal prosecution. But, it is not so in the case of acts coming within the ambit of s 32. (It is agreed that the acts alleged in our case come squarely within the meaning of s 32(c)). The same question must be asked here. Would those acts enumerated in s 32 be visited by some form of punishment? The simple answer is a big 'No'. The marginal note for s 32 reads 'Avoidance of election on election petition.' If the act as is alleged is proved, then it will be a ground to declare the election of the respondent concerned null and void. So none of the acts enumerated in s 32 is criminal in nature. Two acts may be called by the same name but one is visited with punishment while the other is not. In the former, if the respondent is found guilty and convicted, he may be imprisoned and, at the same time, his election to office would be declared null and void (s 31). In the latter, there would be no finding of guilt and no conviction, only the respondent's election will be declared null and void (s 32).

It was also submitted by learned counsel for the first respondent that by the operation of sub-s (3) of s 37, should the petitioner succeed before the election judge, the first respondent would also suffer penal consequences, in that the 'same incapacities' would be imposed on him as if he had been convicted of the offence. I find that the incapacity referred to here merely means a form of disqualification, something of the nature described in the proviso to sub-s (2) of s 11. That is to say, that his seat will be vacated and he will be barred from standing for any election within five years from the date his seat is vacated.

If I may hasten to add that Pt VI of the Act contains only two sections and they provide for two types of grounds for the avoidance of election, namely, one by reason of a conviction in a criminal court under s 31, and the other by the finding of an election judge by way of a petition to him, on any of those grounds laid down in s 32. Corrupt practice is one of those grounds. If the standard of proof to be applied in a petition before an election judge were the same as in a criminal prosecution, then there would be absolutely no necessity to appoint an election judge for the purpose, as the matter could be disposed of by the sessions court. This explains why the act is made a ground to avoid an election under s 32 and that it provides a different standard of proof.

Section 32 provides that the 'grounds' mentioned therein may be proved 'to the satisfaction of the election judge'. Wan Yahya J in the case of *Re Tanjong Puteri, Johore State Election Petition; Abdul Razak bin Ahmad v Datuk Md Yunos bin Sulaiman & Anor*,[5] had enlightened us on the meaning of 'to the satisfaction of the election judge' thus [at p 113]:

> The real authority enabling the election judge to declare the election of a candidate void is contained in s 32(b) and the standard weight of evidence required to move the court into making such an order is 'proof' to the satisfaction of the election judge. It is neither wise nor practical to lay down an inflexible

A standard of proof to be followed in an election case when dealing with such application and for that reason the legislature has obviously left it for the election court to decide the quality of evidence required to prove a case according to the circumstances of each case.

With respect, he does not, as I understand him, equate it to the standard B of proof in a civil case, ie on balance of probabilities. He talks of the 'quality of evidence' according to the 'circumstances of the case'. Of course, in every case, the court will look for quality of evidence and the meaning of 'proof' as defined in the Evidence Act 1950. The question here is, who is to prove 'to the satisfaction of the court'? I suppose both sides are to do it. If so, how is the judge to decide which side has satisfied him. On the C expression 'to the satisfaction of the court', it is pertinent to recall the words of our learned, the then Lord President, Tun Azmi, in the case of *Ng Eng Kooi & Anor v PP*,[6] thus [at p 271]:

> As far as question (a) in this reference is concerned, it is to be pointed out that the words 'satisfaction of the court' can mean one of two things. First, they can D mean, 'satisfaction on a balance of probabilities' and, secondly, 'satisfaction beyond reasonable doubt' (see *R v Gaunt* [1964] Crim LR 781). However, the distinction between 'satisfaction on a balance of probabilities' and 'satisfaction beyond reasonable doubt' is well established in the law, since the courts always stress, when the onus of proof is on the accused (for example, where he raises the defence of insanity, or where some statute puts the onus on him) that he need E satisfy the jury only on the balance of probabilities, which is lesser than the onus on the prosecution, namely, satisfaction beyond reasonable doubt. Taking the words 'satisfaction of the court' to mean 'satisfaction on the balance of probabilities' it would seem clear that question (a) in this reference can be equated with question (b).
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> It is clear that the expression 'to the satisfaction of the court' was taken by F the learned president from the judgment in *Fatimah*'s case [1960] MLJ 109. We have looked at that judgment where Hepworth J said simply that in the circumstances of that case the accused (who was charged with being knowingly in possession of uncustomed goods) had 'to prove to the satisfaction of the court' that the duty had not been paid. He did not say whether the accused had to satisfy the court beyond reasonable doubt, or on a balance of probabilities or by G raising a reasonable doubt in the case for the prosecution. It is therefore plain that the use of the mere expression 'to the satisfaction of the court' is unsatisfactory when referring to the degree of proof required of a defendant in prosecutions under the Customs Ordinance.

The court of an election judge, in my view, cannot be a criminal court and therefore, it must be a civil court and no other. It cannot be a hybrid. Only H two types of onus of proof are known in our system. One is to prove beyond reasonable doubt and the other is on the balance of probabilities. In a criminal court, the onus is beyond reasonable doubt, while in a civil court, it is on the balance of probabilities. To rebut a presumption by an accused in a criminal proceeding, the standard is on the balance of probabilities. As I I have earlier said, a court of an election judge is a civil court and I am further fortified that it is so, by reason of sub-s (2) of s 33 of the Act in that his power to call witnesses and to have them sworn before him is 'as nearly as circumstances admit' as that of a High Court judge sitting in the exercise of his 'original civil jurisdiction'.

Now, Pt VII of the Act deals with the matter of 'Election Petitions' and under it one finds ss 33–42. The marginal note for s 42 is 'procedure and practice on election petitions'. Subsection (1) provides that the procedure and practice on election petitions shall be regulated by rules of court. I agree with the submission of the learned counsel for the petitioner, Dato Zaki on the construction of sub-s (1). On the words 'rules of court', Seah J in *Sabdin Ghani v Mohamed Saidi Lampoh & 25 Other Election Petitions*[7] said [at p 73]:

> In my opinion, 'rules of court' means the High Court Rules in operation at the time of the filing of the election petitions. Since the Rules of the High Court in Borneo 1963 had been replaced by the Rules of the High Court 1980 since 1 June 1980, it is my opinion that the expression 'rules of court' in s 42(1) means the Rules of the High Court 1980.

In an earlier case of *Abu Bakar v Mohamed Zain,*[8] Yong J had this to say [at p 169]:

> After giving careful consideration to the submissions made by both counsel I held that subject to ss 38(2) and 42(2) of the Election Offences Ordinance 1954 and the Election Petition Rules 1954, the Rules of the Supreme Court 1957 are applicable in election cases in Malaya.

At the courts, when we say 'rules of court' we do not mean to include the Code. The Code was enacted by Parliament while 'rules of court' are made by a rules committee appointed under s 17 of the Courts of Judicature Act 1964. The rules are made for purposes as laid down in s 16, generally for the regulating of the conduct, etc, of the High Court and the Supreme Court in their civil jurisdiction. They are always written in small letters.

Upon examination of the provisions of the relevant statutes and the cases, it is my considered opinion that the words 'rules of court' in s 42(1) of the Act must mean, for the purposes of the present case, being a petition founded on a ground under s 32, the Rules of the High Court 1980, while the standard of proof as required under s 32 must be that as applied in civil proceedings, and that is, on 'the balance of probabilities'.

Objection dismissed.

Reported by Yap Foo Ken